

FEDERAL COURT OF AUSTRALIA

Lee v Minister for Immigration & Multicultural & Indigenous Affairs
[2005] FCA 464

MIGRATION – application for review of decision of the Migration Review Tribunal – application for subclass 820 (spouse) visa – criteria for determining spousal relationship under reg 1.15A of the *Migration Regulations 1994* (Cth) – living together for six months or more to be taken as strong evidence of genuine and continuing relationship – creation of statutory presumption – insufficient evidence of social recognition of relationship – insufficient evidence of joint financial obligations – alleged jurisdictional error by Tribunal – failure to take evidence of living together for six months or more as strong evidence of marital relationship – denial of procedural fairness – legitimate expectation that Tribunal would give weight to statements not in the form of statutory declarations – Applicant not informed that statements would be given no weight nor given opportunity to present statements in form acceptable to Tribunal – Tribunal free to determine strength of and weight given to other evidence – no jurisdictional error or error of law – no failure of procedural fairness – application dismissed.

Migration Regulations 1994 (Cth) reg 1.15A(1A), reg 1.15A(3), reg 1.15A(5)

Minister for Immigration and Multicultural Affairs v Asif 60 ALD 145 cited

Davis v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 686 cited

Lumanovska v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 1321 cited

WACO v Minister for Immigration and Multicultural Affairs (2003) 131 FCR 511 cited

WAJR v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 204 ALR 624 cited

**YOUNG NAM LEE v MINISTER FOR IMMIGRATION AND MULTICULTURAL
AND INDIGENOUS AFFAIRS
WAD 222 OF 2004**

**FRENCH J
8 APRIL 2005
PERTH**

GENERAL DISTRIBUTION

**IN THE FEDERAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY**

WAD222 OF 2004

**BETWEEN: YOUNG NAM LEE
 APPLICANT**

**AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL
 AND INDIGENOUS AFFAIRS
 RESPONDENT**

JUDGE: FRENCH J

DATE OF ORDER: 8 APRIL 2005

WHERE MADE: PERTH

THE COURT ORDERS THAT:

1. The application is dismissed.
2. The applicant pay the respondent's costs of the application.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

**IN THE FEDERAL COURT OF AUSTRALIA
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JUDGE: FRENCH J

DATE: 8 APRIL 2005

PLACE: PERTH

REASONS FOR JUDGMENT

- 1 The applicant, Ms Young Nam Lee, is a national of Korea who was born on 19 March 1967. She applied, on 3 April 2000, for permanent residence as the spouse of an Australian citizen. The application form completed by her embodied an application for a permanent visa, a Partner (Residence) (class BS) visa which ordinarily cannot be granted until two years have elapsed from the lodgment of the application and an application for a temporary visa called a Partner (Temporary) (class UK) visa which can be granted immediately.
- 2 The delegate of the Minister refused the grant of both visas by a decision given on 12 February 2002. The application was made on the basis that the applicant is the spouse of Mr Trevor Roy Harcombe, who is her sponsor in this application. He is an Australian citizen who was born in Australia on 20 March 1960. Following the refusal of the application by the Minister's delegate, the applicant lodged an application for review of that decision with the Migration Review Tribunal (the Tribunal) on 14 March 2002.
- 3 On 1 September 2004, the Tribunal affirmed the decision under review, finding that Mrs Lee was not entitled to the grant of a Partner (Temporary) (class UK) visa or a Partner (Residence) (class BS) visa. The Tribunal made a number of findings of fact about the bases upon which the application for the visa was advanced. It identified as the first issue that it had to determine the question whether the visa applicant was the spouse of the sponsor at the

time of application, having regard to the considerations relevant to a spousal relationship set out in reg 1.15A of the Migration Regulations 1994 (Cth) (the Regulations).

4 The criteria for the relevant visa, also known as a subclass 820 spouse visa, include as a sufficient condition, and no doubt for present purposes, a necessary condition, that the applicant is the spouse of a person who is an Australian citizen. So much appears from cl 820.211(2) of the criteria set out in the second schedule to the Regulations for a subclass 820 visa. The requirement that the applicant be the spouse of an Australian citizen attracts the operation of reg 1.15A of the Regulations, which sets out the circumstances under which a person is to be regarded as the spouse of another person. In particular, it requires that they either be in a married relationship, as described in subreg (1)A or in a de facto relationship, as described in subreg (2). The basis upon which the applicant put her case before the Tribunal was that she and her nominator were in a married relationship.

5 Regulation 1.15A(1A) says:

‘Persons are in a married relationship if:

- (a) they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and*
- (b) the Minister is satisfied that:*
 - (i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (ii) the relationship between them is genuine and continuing; and*
 - (iii) they:*
 - (A) live together; or*
 - (B) do not live separately and apart on a permanent basis.’*

Regulation 1.15A(3) requires:

‘In forming an opinion whether 2 persons are in a married relationship

...

the Minister must have regard to all the circumstances of the relationship, including, in particular:

- (a) the financial aspects of the relationship;*

...

- (b) the nature of the household;*

...

- (c) *the social aspects of the relationship;*
- ...
- (d) *the nature of the persons' commitment to each other...*

The latter consideration includes reference to the duration of the relationship, the length of time during which the persons have lived together, the degree of companionship and emotional support that the persons draw from each other and whether the persons see the relationship as a long-term one. Regulation 1.15A(5) provides:

'If 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason.'

6 It is not necessary for present purposes to set out in detail the somewhat convoluted evidence of the initial meeting between the applicant and the man who was to become her husband which is said to have occurred at the Strathfield railway station nor the detailed history of the relationship thereafter. The Tribunal made certain findings of significance to its conclusion that the delegate's decision should be affirmed. Those findings included the following:

26. *There is no evidence of any joint accounts, assets, mutual wills or insurance policies at the time of application. At the time of application, the visa applicant and the sponsor held separate bank accounts. The only evidence at the time of application of a joint financial obligation is that they were both tenants of the property at Carlingford and that the Energy account was in joint names.'*

...

28. *At the time of application, the visa applicant submitted evidence that she and the sponsor were both tenants of the property at Carlingford but the only evidence submitted of joint utility accounts was an Energy account in joint names. There was no evidence submitted of any joint responsibility for the care and support of the sponsor's children.*

...

30. *The visa applicant and the sponsor gave conflicting information to the Department at interview about the sponsor's payment of maintenance at that time. The visa applicant and the sponsor gave conflicting information to the Tribunal as how often the sponsor sees his children and whether or not they stay overnight. The Tribunal concluded from the conflicting information from the visa applicant and the sponsor that they still do not take any joint responsibility for the care and support of the sponsor's children.'*

7 At par 38 of its decision the Tribunal said:

'The Tribunal was very concerned about the evidence the visa applicant and the sponsor have given as to how they met. They have contradicted one another in the details they have given about how they met in their evidence to the Department and to the Tribunal. The consistent evidence is that they met on Strathfield station and at some point, the sponsor put his phone number in the visa applicant's bag without telling her. At some later date, the visa applicant lost her keys and in searching through her bag found the piece of paper and phoned it, not knowing to whom the number belonged. The Tribunal finds this evidence so extraordinary, as to not be credible.'

At par 44 the Tribunal said:

'In determining whether the visa applicant and the sponsor had a mutual commitment to a shared life as husband and wife to the exclusion of all others, the Tribunal was concerned about their credibility as to their accounts of their initial meeting and the visa applicant's lack of honesty in relation to her time in Melbourne....'

I interpolate that this comment refers to evidence of an alleged absence from the spouse in Melbourne not long after the marriage. The Tribunal went on:

'The Tribunal was also concerned about the limited evidence of social recognition of the relationship given their evidence that they have been living together since July 1999. Considering these issues, together with the available evidence, the Tribunal is not satisfied that there was a mutual commitment to a shared life as husband and wife to the exclusion of all others at the time of the application.'

8 There are then two findings and holdings of importance which ground the application for judicial review of the Tribunal's decision. The first of those appears at par 45 where it is said:

'The limited evidence of social recognition and the lack of the visa applicant's honesty with the sponsor, together with the limited financial relationship at the time of application, also concerned the Tribunal in determining whether the relationship was genuine and continuing at the time of application. Although the Tribunal noted that subregulation 1.15A(5) provides that living together at the same address for 6 months or longer is to be taken to be strong evidence that a relationship is genuine and continuing, the Tribunal is satisfied that the evidence establishes that the relationship was not genuine and continuing at the time of application. Having regard to all the circumstances of the relationship as set out above, the Tribunal has drawn the conclusion that at the time of application the relationship between the visa applicant and the review applicant was not genuine and continuing.'

- 9 That finding is significant and the subject of challenge in terms of its application of the requirement in subreg 1.15A(5) to treat a period of cohabitation of six months or more as strong evidence that the relationship is genuine and continuing. The second finding, which appears at par 31 and grounds the second limb of the attack on the Tribunal's decision is in the following terms:

'At the time of application the visa applicant submitted 12 statements signed by different people, stating "This is to verify that Trevor Harcombe and Young Nam Lee have been together in a relationship and living together for 9 months." The Tribunal gives little weight to these statements because they are not statutory declarations and there are no details as to how these people know the visa applicant and the sponsor and how they know they are in a relationship.'

- 10 The application for prerogative relief against the Tribunal's decision filed in this Court on 24 September 2004 sets out two grounds as follows:

- '1. The Tribunal has made the jurisdictional error of failing to comply with the statutory provisions set out in Regulation 1.15A(5) of the Migration Regulations which obliges the Tribunal to conclude that, if 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing.*
- 2. The Tribunal has made the jurisdictional error of denying the Applicant procedural fairness:*

Particulars

- (a) The Tribunal has rejected as of little weight 12 statements signed by different people verifying that Trevor Harcombe (the Applicant's Sponsor) and the Applicant had been together in a relationship and living together for 9 months because they are not statutory declarations and contain no details as to how these people know the visa applicant and the Sponsor and how they know they are in a relationship.*
- (b) The Tribunal failed to give the Applicant any warning that it would reject the said statements as of little weight for the reasons stated, or at all.*
- (c) The Tribunal failed to give the Applicant an opportunity to present the statements in a form which the Tribunal would accept as verifying the facts declared in the statements.*

- 11 I turn to the first ground relating to the application of reg 1.15A(5). In her outline of submissions, the applicant says:

'The Tribunal at paragraph 45, AB pp 324-5, cites –

- (a) limited evidence of social recognition,*
- (b) lack of honesty of the applicant with the sponsor, and*
- (c) the limited financial relationship at the time of the application (ignoring subsequent evidence as to an increasing financial relationship)*

as establishing that the married relationship of the applicant and the sponsor was not genuine and continuing...'

And further:

'The Tribunal notes that sub-regulation 1.15A(5) provides that living together at the same address for 6 months or longer is to be taken to be strong evidence that a relationship is genuine and continuing, but undertakes no process of attributing weight to that evidence, taking into account its strength and balancing it against the evidence relied upon to reach an adverse conclusion.'

- 12 It is submitted that the Tribunal effectively failed to treat the period for which the applicant and sponsor have been living together as strong evidence and therefore failed to comply with the direction in subreg 1.15A(5). The respondent points to the decision of the Full Court in *Minister for Immigration and Multicultural Affairs v Asif* 60 ALD 145 where, at par 23 the Court said of reg 1.15A(5):

This subregulation creates something in the nature of a statutory presumption of the existence of a genuine marital relationship between the visa applicant and spouse, where they have cohabited for at least 6 months: such cohabitation is taken to be "strong evidence" that the relationship is genuine and continuing. This subregulation is so worded as to suggest that where the decision-maker has to decide whether a genuine marital relationship existed between a visa applicant and spouse who were together at a particular date, if at the time the question arises for determination the applicant and spouse have been together for 6 months (or more) that is to be taken as strong evidence that they were in a genuine and continuing relationship at the relevant date. To read this subregulation as the respondent would as making 6 months (or more) cohabitation strong evidence of a genuine and continuing relationship at a particular date only if the minimum 6 months' period had already passed by that date involves an unwarranted gloss on what we regard as the clear words of the subregulation.'

The important element of that is the observation that the subregulation creates something in the nature of a statutory presumption.

- 13 In a single judge decision in *Davis v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 686 Dowsett J said:

'The applicant and Mr Davis had been living together for more than six months at the relevant time. The Tribunal was aware of the evidentiary significance of this fact and referred to it expressly in its reasons. See para 39. However that provision did not fetter the power of the tribunal to determine the weight to be given to other evidence. Even in the absence of a provision such as subregulation 1.1(5)A(5), it would obviously be necessary to give great weight to the fact that the parties had lived together for a substantial period of time prior to the application. There is no reason to believe that the Tribunal did not do so.'

- 14 Then in *Lumanovska v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1321, an earlier decision of Gray J, his Honour said at [17]:

'It is plain from an examination of the passage from the Tribunal's reasons that I have already quoted that the Tribunal did precisely what was required by reg 1.15A(5). In the heading to that portion of its reasons for judgment, the Tribunal expressly noted that subreg (5) provided that living together at the same address for six months or longer is to be taken to be strong evidence that a relationship is genuine and continuing. It then proceeded to engage in the balancing exercise to see whether other evidence that it had as to the nature of the relationship outweighed this strong evidence. It recited that the parties had not lived together as husband and wife in the first four years of their marriage. While accepting that they had shared a house in Kirkham Road since February 2002, the Tribunal found it was not satisfied that the applicant and the nominator then lived together as husband and wife.'

- 15 In this case, the Tribunal has made express reference to the requirement of subreg 1.15A(5) that:

'...living together at the same address for 6 months or longer is to be taken to be strong evidence that a relationship is genuine and continuing...'

However, it set against that other evidence before it and its satisfaction that that evidence established that the relationship was not genuine and continuing at the time of the application.

- 16 I have already set out the various findings which the Tribunal made in the course of its reasons that evidently led it to that conclusion. In my opinion, whether or not one agrees

with the conclusion drawn, there is no error of law, apparent from the Tribunal's reasons, in the application of reg 1.15A(5) which would constitute jurisdictional error supporting the grant of prerogative relief. The Tribunal has made a judgment which in the end is a judgment about the strength of the other evidence in the case against the presumption in subreg 1.15A(5) and the challenge in this respect amounts to a challenge on the merits rather than one which exposes an error of law.

- 17 The burden of the submissions made on behalf of the applicant in this case focused upon ground 2 and what was said to be the procedural fairness issue exposed in that ground. By way of background, it should be noted that the statements which were, in effect, dismissed by the Tribunal as of little weight were submitted in support of the original application which was considered by the delegate. Each of those statements is pro forma and made with what looks like the same typewriter or printer. The pro forma text is in the following terms:

'TO WHOM IT MAY CONCERN'

and below that:

'THIS IS TO VERIFY THAT TREVOR HARCOMBE AND YOUNG NAM LEE HAVE BEEN TOGETHER IN A RELATIONSHIP AND LIVING TOGETHER FOR 9 MONTHS.'

Below that there is the typed word 'NAME' with a colon and then below that the typed word 'SIGNATURE' with a colon. In each of the statements that were submitted to the delegate, somebody has filled in a name and address and a signature opposite the words 'NAME' and 'SIGNATURE' respectively.

- 18 On 4 July 2003, the Tribunal sent a letter to Ms Lee, care of her migration agent, who was then representing her. In that letter it said:

'In reviewing your case, the Tribunal must assess whether you and your partner have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and whether the relationship between you and your partner is genuine and continuing. The Tribunal invites you to provide further information that is relevant to these issues. Please see the attached sheet for examples of the type of evidence you could provide.'

The attached sheet is a one and a half page sheet headed 'EVIDENCE IN PARTNER CASES'. It begins:

'In assessing your case, the Tribunal must have regard to regulation 1.15A of the Migration Regulations. Regulation 1.15A provides that the Tribunal must have regard to all the circumstances of your relationship, including, in particular:...

It lists the four headings that I have already listed with the detail from the regulation including:

'The nature of the persons' commitment to each other, including: the duration of the relationship, the length of time during which the persons have lived together, the degree of companionship and emotional support that the persons draw from each other; and whether the persons see the relationship as a long-term one.'

Having set out those circumstances, the sheet then continues:

'You may wish to provide any or all of the following evidence. Please note that this list is not exhaustive. You should provide any evidence you consider is relevant to the consideration of whether you and your spouse have been living together on a genuine and continuing basis. This evidence may be in the form of: ...'

There are then listed a number of types of documentary evidence that would support a relationship of a genuine and continuing character. It includes such things as statements from joint bank accounts, joint rental receipts and utility accounts, joint purchases, evidence of joint financial relationships, mutual wills and so on. Then towards the end of the list the following:

- statutory declarations from you and your partner setting out the history of your relationship*
- statutory declarations from parents, family members, relatives, friends or other interested parties regarding your relationship'*

and then at the end:

'any other evidence you consider to be relevant'

19 On 21 November 2003 the Tribunal sent to Ms Lee through her agent an invitation to appear before the hearing of the Tribunal, which included the following:

'You are invited to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to your application for review.

You may also request that the Tribunal:

- . obtain oral or written evidence from other persons;*
- . obtain other written material.'*

20 On 13 February 2004, Ms Lee's migration agent, Mr Oh, from Australian Visa Consultation Service sent a letter to the Tribunal responding to that request and including the following items which were attached to or enclosed with the letter:

- . Photos*
- . Bills in joint names*
- . Telephone records*
- . Flight tickets from Sydney to Perth to Sydney*
- . Income tax returns for both husband and wife*
- . Marriage registration certificate'*

21 In dealing with the materials, the Tribunal, as I have already indicated, said at [31] in relation to the twelve pro forma statements submitted to, it that it gave little weight to them because they are not statutory declarations and there are no details of how the signatories know the visa applicant and the sponsor and how they know they are in a relationship.

22 The applicant submitted, inter alia, that she could legitimately have expected that the Tribunal would give substantial weight to the statements. She would be unlikely to have gone to the trouble of collecting that number of statements unless she had that expectation. It would have been reasonable for her to expect that given the provision of subreg 1.15A(5) an assertion of the fact that the applicant and sponsor had been living together for six months or longer by third parties where there is no evidentiary basis for concluding that those third parties had no credibility would constitute strong evidence of substantial weight which it would be difficult to rebut. She complained that the Tribunal without any prior notice to her that it might take the approach it did, made the finding which I have already cited.

23 She submitted that if she had been given notice of the Tribunal's view as to what it regarded as both formal and substantive inadequacies of the evidence, it would have allowed her the opportunity to obtain statutory declarations containing the details which the Tribunal regarded as sufficient to incline the Tribunal to accord them significant weight and potentially alter the conclusion which the Tribunal might have reached.

- 24 The circumstances in this case were said to bear some analogies to circumstances in which the Tribunal has made findings relating to the genuineness of certain documents without notice to parties. Reference was made in the submissions to *WACO v Minister for Immigration and Multicultural Affairs* (2003) 131 FCR 511; my own judgment in *WAJR v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 204 ALR 624 and related cases.
- 25 Counsel for Ms Lee submitted that the finding of the Tribunal amounts to a finding that the signatories to the statements have engaged in a dishonest exercise, that underpinning the Tribunal's rejection of the statements is the implication that they are the product of some sort of dishonest conspiracy to mislead the authorities about the relationship by putting forward false evidence.
- 26 In my opinion, there is no failure of procedural fairness here. The Tribunal, of course, is not obliged as a matter of procedural fairness to alert parties about, and invite their comments on, its thought processes in decision-making, nor upon the possibility that it might not accept certain of the evidence tendered by a party. The process is, of course, inquisitorial but in the course of it the applicant for review submits the evidence that the applicant relies upon and makes his or her case based upon that evidence.
- 27 In this case, the applicant was represented by a migration agent. The Tribunal is entitled to accept or reject or give such weight to the evidence proffered as it thinks appropriate in all the circumstances. Of course, if there is a positive finding of dishonesty or concoction or forgery that the Tribunal makes, of which no prior notice has been given to an applicant in the course of the hearing or otherwise, then a question of procedural fairness can arise, as did in the cases to which I have made reference earlier.
- 28 In this case, however, the Tribunal assessed the weight or the little weight it gave to the statements on two bases. One of those bases was their content, and perhaps that is the most important aspect of its assessment. It said there are no details as to how these people know the visa applicant and the sponsor and how they know they are in a relationship. Certainly, the statements themselves are spare in the extreme. They are pro forma and it is not in the least surprising that any decision-maker would regard them with great reservation and given them little or no weight. The second basis was that they were not statutory declarations. It

may be that had they been statutory declarations, the Tribunal might have been inclined to give them a little more weight, although it is hard to see how on the basis of their content it could have. There can be no unfairness in the sense that the applicant was caught by surprise by some unannounced formal requirement. It did in its advice about the evidence relating to spousal relationships mention as one possible support for the applicant's claims that they could provide statutory declarations by parents, friends and others.

- 29 In my opinion, there is no unfairness either in form or as a matter of practicality in this case. Therefore, I will dismiss the application.

I certify that the preceding twenty-nine (29) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice French.

Associate:

Dated: 26 April 2005

Counsel for the Applicant: Mr GM McIntyre SC

Solicitor for the Applicant: SS Chohan

Counsel for the Respondent: Mr JD Allanson

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 8 April 2005

Date of Judgment: 8 April 2005